(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: MAY 23 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the subsequent appeal. Counsel filed the instant motion to reopen and motion to reconsider the AAO's decision. The motion to reopen will be dismissed, the motion to reconsider will be granted, and the previous decisions of the director and the AAO will be affirmed.

The petitioner describes itself as an information technology company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1] As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the U.S. Department of Labor.

The director's decision denying the petition concluded that the beneficiary did not satisfy the minimum educational requirements of the offered position and the requested preference classification. The AAO's decision dismissing the appeal and affirming the director's decision concluded that the requested preference classification and the terms of the labor certification require at least a bachelor's degree or foreign equivalent from a college or university, and the beneficiary's associate membership in the [redacted] is not a degree from a college or university.

Counsel's brief accompanying the motions to reopen and reconsider states that the petitioner intended the labor certification to state that it would accept a combination of education and experience, where one year of relevant experience is equivalent to one year of education towards a bachelor's degree. Counsel's brief also states that the beneficiary's certificate from [redacted] constitutes a degree from a "professional school" under 8 C.F.R. § 204.5(k)(2).

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[2] The petitioner's motion to reopen contains no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). All evidence submitted was previously available and could have been discovered or presented in the previous proceeding. As the

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[1] In pertinent part, section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

[2] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." WEBSTER'S NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984) (emphasis in original).

petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen. Therefore, the motion to reopen is dismissed.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

> *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The brief submitted in support of the motion to reconsider states specific reasons for reconsideration and claims that the previous USCIS decisions were based on an incorrect application of law and/or USCIS policy. In support of its claims, the brief also cites to supporting regulations and relevant case law. Therefore, the motion to reconsider is granted.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In limited circumstances, USCIS may consider a petitioner's intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. *See*

Maramjaya v. USCIS, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008). The best evidence of the petitioner's intent concerning the actual minimum educational requirements of the offered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence ensures that the stated requirements of the offered position as set forth on the labor certification are not incorrectly expanded in an effort to fit the beneficiary's credentials. Such a result would undermine Congress' intent to limit the issuance of immigrant visas in the professional and skilled worker classifications to when there are no qualified U.S. workers available to perform the offered position. *See Id.* at 14. However, USCIS is bound by the language of the labor certification job requirements in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983).

In the instant case, the labor certification states that the offered position requires a U.S. master's degree (or a foreign equivalent degree), or, in the alternative, a U.S. bachelor's degree (or a foreign equivalent degree) and 60 months of experience. The labor certification does not permit the additional alternate combination of education and/or experience. The petitioner has failed to establish that the terms of the labor certification are ambiguous. Therefore, the AAO declines to consider counsel's new claims on motion about the petitioner's intent regarding the meaning of the labor certification. The AAO will read and apply the plain language of the labor certification, which is summarized above. Further, if the labor certification did state that the offered position could be satisfied with less than an advanced degree or a bachelor's degree and five years of progressively responsible experience (such as an equivalency to a bachelor's degree based on experience), the petition could not be approved in the requested advanced degree professional classification.

Counsel also claims on motion that the beneficiary's associate membership in constitutes a degree from a "professional school" pursuant to 8 C.F.R. § 204.5(k)(2), which states that an advanced degree is a United States academic or professional degree or a foreign equivalent degree *above the baccalaureate level*. (Emphasis added). However, the beneficiary possesses associate membership from as opposed to a degree from a school. In addition, the record does not contain evidence establishing that the beneficiary possesses the foreign equivalent of a professional degree *above the baccalaureate level*. Instead, beneficiary attempts to qualify for advanced degree professional classification based on the fact that he possesses a "United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." *Id.* Therefore, counsel's claim that the beneficiary's associate membership in constitutes a degree from a professional school pursuant to 8 C.F.R. § 204.5(k)(2) is rejected.

The AAO dismissing the appeal concluded that associate membership in is comparable to a U.S. bachelor's degree, but it does not constitute a degree from a college or university as required by the requested preference classification. This is conclusion is affirmed.

It is noted that the regulation at 8 C.F.R. § 204.5(k) uses a singular description of the degree required for classification as an advanced degree professional. In 1991, when the final rule for 8 C.F.R. §

204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991) (emphasis added).

For individuals such as the beneficiary, the regulation states that advanced degree professional petition must contain "An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(B). In another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) of the Act (relating to aliens of exceptional ability). However, for the advanced degree professional classification, it is clear that the degree must be from a college or university.

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required.

Thus, the plain meaning of the Act and the regulations is that the beneficiary must possess a degree from a college or university that is at least a U.S. baccalaureate or the foreign equivalent. Since the beneficiary's associate membership is not a degree from a college or university, he does not meet the requirements of the requested classification and therefore the petition was properly denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. The previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reopen is dismissed. The motion to reconsider is granted and the previous decisions of the director and the AAO are affirmed.